DISSENT and Opinion Filed August 21, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01443-CV

BABY DOLLS TOPLESS SALOONS, INC., BURCH MANAGEMENT COMPANY, INC., BDS RESTAURANT, INC., AND TTNA, INC., Appellants
V.
GILBERT SOTERO, AS REPRESENTATIVE OF THE ESTATE OF STEPHANIE SOTERO HERNANDEZ, EDUVIGES CHAPA III AS NEXT FRIEND OF A.C.C., A MINOR, AND IVAN HERNANDEZ, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF STEPHANIE SOTERO HERNANDEZ, Appellees

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-00644

DISSENTING OPINION

Before Justices Whitehill, Osborne, and Carlyle
Dissenting Opinion by Justice Whitehill

In the trial court, the Sotero parties opposed Baby Dolls'[1] motions to compel arbitration for three reasons: (i) the Federal Arbitration Act does not apply here for lack of interstate commerce; (ii) the arbitration agreement's scope does not include

[1] I refer to appellants collectively as "Baby Dolls."

their claims; and (iii) the arbitration agreement is procedurally and substantively unconscionable.

On appeal, they argue for affirmance because (i) there is a lack of interstate commerce; (ii) Sotero did not effectively delegate arbitrability questions to the arbitrator; and (iii) there was no "meeting of the minds" that the arbitration agreement would cover these types of claims. The last argument repackages their trial court scope argument, which is a contract construction issue for the arbitrator to decide.

At no point have the Sotero parties asserted that the entire contract, and thus the arbitration clause as well, fails for lack of a meeting of the minds on the contract's essential terms. Yet the majority opinion makes it the sole basis for affirming the trial court's orders. Not only are the grounds that the Sotero parties urged meritless, but so is the ground that the majority opinion asserts for them.

Specifically, the majority opinion affirms the denial of Baby Dolls' motions to compel arbitration because the underlying contract—but not the arbitration clause itself—ostensibly fails for a lack of meeting of the minds on essential terms. That conclusion presents this issue: How does the *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) separability doctrine apply to that contract defense where (i) the party resisting arbitration signed the contract containing the arbitration agreement and (ii) there is no suggestion that she lacked the legal or mental capacity to do so?

Because the record fails to show a viable defense to the arbitration agreement itself (e.g., that Sotero didn't sign the contract, she lacked the capacity to do so, or any other defense that might vitiate the arbitration agreement apart from the rest of her contract), her successors are bound by her arbitration agreement—including her delegation to the arbitrator the authority to decide the scope issue.

Secondarily, the majority opinion raises the prospect of a granted license existing apart from a co-existing agreement that granted the license. But by definition a license cannot exist without some agreement between the licensor and licensee regarding what right is being licensed and on what terms. Therefore, it is nonsensical to accept the idea that the parties could have been confused about the prospect of their license agreement's expiring on December 31, 2017, but Sotero's license to work on Baby Doll's premises nevertheless continued thereafter without the license agreement remaining in effect. Although the majority opinion raises and relies on this metaphysically impossible legal premise, it fails to explain how that "license sans terms" arrangement could be.

I. BACKGROUND

Sotero and Baby Dolls desired a business relationship whereby she could work as a non-employee entertainer at Baby Dolls' venue. The two parties signed an eleven page, twenty-six section (not counting the multi-paragraph preface), single spaced contract governing their business relationship. Their contract spanned a wide range of relationship particulars concerning when she would work and what their

financial arrangement would be, among many others. Another relationship particular was a seven paragraph dispute resolution section. That section is devoted almost entirely to the parties' arbitration agreements.

The contract begins with Sotero's acknowledging that she (i) read and reviewed the agreement in its entirety; (ii) had an opportunity to consult with her chosen attorney; and (iii) understood the agreement's terms and conditions and knowingly and voluntarily agreed to abide by them. The parties also acknowledged that their contract is the most accurate description of the nature of their relationship and represents their "meeting of the minds" regarding that relationship.

The contract ends with an advisory that the document is a legal contract and the parties should not sign it unless they fully understand its terms and conditions. The contract further invites the parties to question the contract's terms and negotiate changes. Finally, it suggests that the parties should review it with an attorney or other advisors before signing it. (A copy of the License and Lease Agreement is appended to this dissent.)

In sum, Sotero knowingly, voluntarily, and with apparent full contracting capacity accepted Baby Dolls' offer for a working relationship according to the words used in that document—whatever those words mean—and so agreed. Her agreement necessarily includes assent to the contract's embedded arbitration clause—whatever its words mean.

Nonetheless, nullifying the parties' arbitration agreement and preventing an arbitrator from deciding whether the arbitration agreement's scope covers the present claims, the majority opinion concludes that the contract, and particularly its run of the mill automatic renewal clause, is so poorly written that as a matter of law the entire License and Lease Agreement never became a binding contract, thereby ostensibly vaporizing the parties' arbitration agreement.

I disagree because the majority opinion ignores controlling United States Supreme Court and Texas Supreme Court precedents that mandate a different result. Specifically, because the Sotero parties do not dispute Sotero's signature or her capacity to contract, the arbitration agreement's enforceability and scope are for the arbitrator to decide.

Furthermore, in any event, the contract's duration clause can reasonably be construed to be an automatic renewal clause, thereby negating the majority opinion's rationale for concluding that the contract as a whole is terminally vague.

II. ANALYSIS

A. What is the correct analytical framework for deciding whether the contract is too uncertain to be enforced?

1. Introduction

The majority opinion posits that certain words in the contract render the entire document too uncertain and indefinite to reflect a meeting of the minds on its essential terms as a whole and, therefore, the parties' arbitration agreement contained in that contract is also necessarily unenforceable—even if construed as a

standalone agreement. But that approach ignores the separability doctrine's requirements that (i) embedded arbitration agreements are analyzed as though they are independent contracts and (ii) defenses to the remaining contract containing them are for the arbitrator to decide.

The recognized exceptions are whether the resisting party actually signed the contract at issue, her agent was authorized to sign for her, or she had the legal or mental capacity to make the contract. Were these contract signature and contracting capacity defenses involved in this case, they would be defenses to *both* the contract as a whole and the embedded arbitration agreement's separate existence because both agreements are contained in the same written document. That is, those signature and capacity defenses would be double duty defenses to (i) the contract as a whole and (ii) whether the parties in fact "made" a written arbitration contract that the FAA requires for its application. *See* 9 U.S.C. § 2. (It should be noted that arbitration agreements are often created as independent, standalone documents.)

But none of these contract making defenses are at issue here. Therefore, it is for the arbitrator to decide the issue that the majority arrogates to itself—whether there was a sufficiently definite offer and acceptance of the entire contract's essential terms that a decision maker can determine the parties' rights and duties and enforce their contract. Even assuming it's proper to raise the argument sua sponte, the majority errs by failing to apply its enforceability analysis to the arbitration provision as a separate, standalone agreement.

2. Does the FAA apply in this case?

Yes, because the parties said so.

The Sotero parties argue that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) does not apply because the Sotero–Baby Dolls relationship did not involve interstate commerce. We need not address that question because the parties agreed that the FAA applies. The FAA is substantive arbitration law that the parties were free to adopt as applicable to their arbitration agreement. *See, e.g.*, *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011) (orig. proceeding).[2]

3. Statutory Background

Congress enacted the FAA in 1925 to reverse longstanding judicial hostility to arbitration agreements and place those agreements on "the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA thus manifests an "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and requires state or federal courts to "rigorously enforce

[2] Nonetheless, the FAA extends to the outer limits of the federal Commerce Clause. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001) (orig. proceeding). Here, we would also properly conclude that the facts support applying the FAA under that standard too.

agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Section 2 is its "primary substantive provision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This section "provides that written agreements to arbitrate controversies arising out of an existing contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Dean Witter Reynolds*, 470 U.S. at 218 (quoting 9 U.S.C. § 2).

4. United States Supreme Court Authorities

"A party seeking to compel arbitration under the FAA must establish that (1) there is a *valid arbitration clause*, and (2) the claims in dispute fall within that agreement's scope." *Rubiola*, 334 S.W.3d at 223 (emphasis added) (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding)). As shown below, an FAA based arbitration motion's success turns on the arbitration agreement's standalone enforceability.

a. *Prima Paint*

The issue in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) was whether the court or the arbitrator resolves a claim of fraud in the inducement of the entire contract. Based on unambiguous statutory provisions, the Supreme Court held that FAA governed arbitration agreements are severable from the contracts containing them and that fraud in the inducement defenses to the

contract as a whole, instead of the arbitration agreement in particular, are for the arbitrator to decide:

> That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that "the *making of* the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue." Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Id. at 403–04 (footnotes omitted) (emphasis added).

In so holding, the Supreme Court established the bedrock principle that arbitration agreements are, with limited exceptions discussed later, treated separately from the contracts containing them. Stated differently, a single document that contains an embedded arbitration agreement is effectively two separate contracts: One is the arbitration agreement itself, and the other is the rest of the contract.

b. *Moses H. Cone*

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) began as a petition in federal district court for an order compelling

arbitration of a dispute in a pending concurrent state court proceeding. The federal district court stayed that request pending resolution of the state court matter, and the court of appeals reversed that order. The Supreme Court addressed whether the district court's order deferring to the parallel state action was proper under the FAA. Relying in part on *Prima Paint*, the Supreme Court held that FAA § 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *Id*. at 24. The Court further held that § 2's effect is to create a body of federal substantive arbitrability law applicable to any arbitration agreement covered by the statute. *Id*.

c. *Southland Corp.*

Later, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court addressed whether a California statute invalidating certain arbitration agreements covered by the FAA violated the federal constitution's Supremacy Clause. *Id*. at 3. That case involved a franchisee–franchisor dispute. The subject statute had a provision that the California Supreme Court held barred enforcing agreements to arbitrate disputes under that statute.

Relying on *Prima Paint*'s severability principle and *Moses H. Cone*, the United States Supreme Court reversed the California Supreme Court because the FAA is substantive federal law applicable in state courts and preempts inconsistent state law. *Id*. at 12; *see also id.* at 16. Stated differently, the Supreme Court rejected the view that state law can bar enforcing FAA § 2, even regarding state-law claims

brought in state court. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (applying *Southland*).

d. *Buckeye Check Cashing*

Next, in *Buckeye Check Cashing* the Supreme Court decided whether in an FAA governed case the court or an arbitrator should consider the claim that a contract containing an arbitration provision is invalid for illegality. *See id*. at 442. That is, who decides whether an arbitration clause is enforced where the resisting party asserts that the contract as a whole is illegal?

Relying on *Prima Paint* and *Southland*, the Supreme Court for three reasons held it was for the arbitrator to resolve that claim:

> *Prima Paint* and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. . . . Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.

Id. at 445–46.

Stated differently, according to the ultimate judicial authority, in FAA governed cases contract defenses aimed at defeating the underlying contract's validity *as a whole*—instead of defeating the arbitration clause specifically—do not

prevent enforcing the embedded arbitration agreement and must be referred to the arbitrator.

But the Supreme Court identified three contract *making* (not *validity*) defenses, which could negate the contract as a whole, that are for the courts to decide:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson–Humphrey Co.,* 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99 (C.A.3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.,* 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco,* 330 F.3d 1266 (C.A.10 2003).

Id. at 444 n.1.

I next turn to the Texas Supreme Court's application of these principles.

5. Freedom of Contract

To begin, as the supreme court constantly reiterates, courts "'are not lightly to interfere with this freedom of contract'" because all people "'of full age and competent understanding shall have the utmost liberty of contracting, and . . . their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.'" *Chalker Energy Partners III, L.L.C. v. Le Norman Operating LLC*, 595 S.W.3d 668, 673 (Tex. 2020) (quoting *Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951)). Arbitration agreements are contracts too,

and contract freedom principles apply to them as well. *See RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 121 (Tex. 2018).

At this dispute's heart is Sotero's and Baby Doll's freedom to contractually agree that their disputes arising during their relationship, as well as questions regarding their arbitration agreement's validity and scope, shall be resolved by binding arbitration. The majority opinion negates the parties' freely entered into arbitration agreement not for any reason specific to that separable contract but for reasons unrelated to it.

In so doing, the majority opinion ignores the separability doctrine and, like the Sotero parties themselves, fails to articulate any defense to the arbitration clause's standalone enforceability. (The Sotero parties' appellees' brief omits their trial court unconscionability arguments and fails to otherwise challenge the clause's validity. Instead, they argue only that the FAA doesn't apply to the clause and that the clause doesn't delegate arbitrability decisions to the arbitrator or apply to their claims.) Indeed, the Sotero parties concede that the clause would cover other disputes concerning the Sotero–Baby Dolls relationship. *See* Appellees' Brief at 4. That is, the majority opinion does not identify any lack of meeting of the minds or other defense to the arbitration agreement itself as an independent contract.

6. Texas Supreme Court Authorities

Like the federal courts, Texas generally follows a two-step standard regarding motions to compel arbitration: First, a party seeking to compel arbitration under the

FAA must establish the "existence of an arbitration agreement" subject to the FAA. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding). Second, once the movant establishes an agreement, the court decides whether the agreement's scope covers that dispute (unless the parties have delegated that issue to the arbitrator). *Id.*

a. *In re FirstMerit Bank* and *In re RLS Legal Solutions*

In *FirstMerit*, the plaintiffs sued several defendants alleging various common law and statutory claims, and certain defendants moved to compel arbitration. The physical existence of a signed arbitration addendum was undisputed, and it does not appear that the plaintiffs asserted forgery or lack of contracting capacity defenses to the contract. Rather, they opposed enforcing the arbitration addendum based on unconscionability, duress, fraudulent inducement, and revocation defenses to the contract as a whole.

Relying on *Prima Paint*, the supreme court held that "these defenses must specifically relate to the Arbitration Addendum itself, not the contract as a whole, if they are to defeat arbitration," but defenses pertaining to the underlying contract can be arbitrated. *Id*. at 756; *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 648 (Tex. 2009) (orig. proceeding) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.")

In re RLS Legal Solutions, LLC, 221 S.W.3d 629 (Tex. 2007) (per curiam) (orig. proceeding), extended *FirstMerit* to cases where the arbitration agreement is a clause in a larger agreement. *Id*. at 631.

b. *In re Morgan Stanley & Co., Inc.*

1. Majority Opinion

In *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182 (Tex. 2009) (orig. proceeding), the supreme court considered whether a court or an arbitrator should decide if a party to various brokerage agreements lacked the mental capacity to assent to those contracts.

Setting the stage for its ensuing discussion, the court acknowledged *Prima Paint*'s separability doctrine and observed, "Since *Prima Paint*, we have dutifully followed the separability doctrine that presumptively favors arbitration." *Id*. at 185.

After an exhaustive analysis, the supreme court held that the resisting party's mental capacity to sign the contracts with arbitration agreements was for the court to decide, because her mental capacity (or lack thereof) went to the existence of an agreement to arbitrate:

> Given the overwhelming weight of authority, it is apparent to us that the formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator.

Id. at 189. Those *Buckeye* formation defenses related to the contract's execution or the resisting party's contracting capacity. *See* 546 U.S. at 444 n.1.

In reaching its conclusion, the supreme court extensively reviewed *Prima Paint*, *Southland Corp.*, *Buckeye*, and numerous lower court decisions from around the country. *See Morgan Stanley*, 293 S.W.3d at 184–90. In particular, *Morgan Stanley* compared and contrasted the Fifth Circuit's *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) decision, which held that mental capacity to contract was for the arbitrator to decide, with the Tenth Circuit's *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003) decision, which held that issue was for the court:

> There is some disagreement about what *Prima Paint* requires in this situation. The Fifth Circuit in *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002), has concluded that the arbitrator should decide a defense of mental incapacity because it is not a specific challenge to the arbitration clause but rather goes to the entire agreement. The Tenth Circuit reached the opposite result in *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003), concluding that the "mental incapacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract." *Id.* at 1273. Thus, under the Tenth Circuit's view, the mental incapacity defense places the "making" of the arbitration agreement at issue under Section 4 of the FAA, giving the court authority to determine whether the parties have actually agreed to arbitration. *Id.*

293 S.W.3d at 185 (emphasis original); *see also RSL Funding*, 569 S.W.3d at 124. Agreeing with the Tenth Circuit, *Morgan Stanley* concluded by holding that:

> We agree that *Prima Paint* reserves to the court issues like the one here, that the signor lacked the mental capacity to assent. Accordingly, the trial court did not abuse its discretion in declining to yield the question to the arbitrator.

293 S.W.3d at 190.

Along those lines, *Morgan Stanley* cited a Florida opinion that succinctly phrases the distinction:

> A challenge to the very existence of any agreement between the parties is thus distinguishable from a challenge to the validity of a presumptively existing, signed document.

Id. at 188 n.5 (quoting *Operis Grp., Corp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 488 (Fla. Dist. Ct. App. 2007)).

In sum, courts determine defenses like failure to sign, forgery, no authority to sign, or lack of contracting capacity that go to whether the parties ever actually *made* a contract in the first place and not whether the signed contract they lawfully made is otherwise enforceable. But (i) arbitration agreements in contracts signed by a resisting party with contracting capacity are presumptively valid; (ii) non-"making" defenses that go to the contract as a whole are always for the arbitrator to decide; and (iii) non-"making" defenses that go specifically to the separate arbitration agreement are for the court to decide (unless the parties delegated that decision to the arbitrator).

2. Justice Hecht's Dissent

Justice Hecht's dissent illustrates why different rules exist for (i) contract making defenses such as failure to sign, forgery, no agent authority, and lack of contracting capacity as contrasted with (ii) defenses like fraud in the inducement, illegality, unconscionability, duress, and other defenses that attack a lawfully made contract. Specifically, citing FAA § 4, Justice Hecht wrote that before a court can

compel arbitration, "it must be satisfied that the making of the agreement for arbitration . . . is not an issue." 293 S.W.3d at 192 (Hecht, J., dissenting) (internal quotation and footnote omitted). But he went on to explain the logical difficulty in permitting arbitrators to decide contract execution and contracting capacity defenses:

> But what if the challenge to the contract is that it never came into being? Since "arbitration is a matter of contract", the issue must be one for the court to decide. Otherwise, an arbitrator would be put in the position of deciding whether he was authorized to decide the parties' dispute, concluding either that he was not authorized, a logical circularity, or that he was, and raising himself by his own bootstraps. Thus, whether a person is bound by a contract he never signed is an issue for the court. So, too, would seem to be issues whether a person's signature on a contract was forged, whether a person's agent was authorized to sign, and whether an offer was withdrawn before a contract was signed.

Id. at 192–93 (Hecht, J., dissenting) (footnotes omitted).

B. Application

Here, the majority opinion's conclusion is faulty for several reasons. But before discussing those reasons, I observe that in the trial court the Sotero parties did not deny the arbitration agreement's validity and instead focused their challenge on whether their claims fit that agreement's scope:

> But here, Plaintiffs are not challenging the validity of the agreement to arbitrate, but rather whether the claims fall under the arbitration clause at all. . . . Plaintiffs are not disputing the terms of the agreement per se, rather, Plaintiffs argue that the agreement is irrelevant to their claims and thus, they are not subject to arbitration for them.

[CR 95].

Although their appellees' brief is less emphatic on the point, it doesn't contest the arbitration agreement's validity either.[3] Thus, even they at least implicitly recognized and applied the separability doctrine in their arguments. And their failure to assert that ground for denying the motions to compel prevents the majority opinion from relying on that ground for them. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 121 (Tex. App.—El Paso 2018, no pet).

1. The majority opinion ignores the separability doctrine.

Sotero signed the contract and initialed every page, including the pages containing the parties' arbitration agreement. The Sotero parties do not argue otherwise. Nor do they suggest that she lacked legal or mental capacity to enter into either agreement. And the signed contract conclusively establishes that there was a completed offer and acceptance of both the Licensee and Lease Agreement's and the arbitration agreement's terms and conditions.

Nor does the majority opinion discuss, let alone rest on, any defense specific to the arbitration agreement itself. Specifically, the majority opinion does not assert that there is any meeting of the minds failure regarding the actual arbitration agreement's essential terms. That the parties dispute the arbitration agreement's

[3] In the trial court, the Sotero parties' amended surreply to defendants' reply brief argued that the arbitration agreement expired on December 31, 2017 (when they say that the Lease portion of the License and Lease Agreement expired) but the License portion of the License and Lease Agreement was automatically renewed. They did not, however, argue that the entire contract was void for lack of a meeting of the minds based on their interpretation of the contract's duration clause. They made similar arguments during oral argument in the trial court. But again, they did not argue that the entire contract was void for lack of a meeting of the minds based on the duration clause or otherwise.

scope doesn't mean that they didn't agree on a scope at all. Rather, it proves just the opposite.

Furthermore, the logical circuity and bootstrap problems Justice Hecht identified in his *In re Morgan Stanley* dissent don't pertain to a defense that the contract as a whole fails for lack of a meeting of the minds on the contract's essential terms where, as here, the resisting party signed the contract; she had the lawful capacity to do so; and there is no legal impediment to the parties having made a presumptively valid written and signed contract containing an arbitration clause. Rather, that analysis is a matter of contract construction and is the daily grist of commercial litigation, be it in the courts or arbitration.

Thus, based on the separability doctrine and these facts, the arbitration clause itself is a binding and enforceable standalone contract to which the majority opinion offers no defense, much less a viable one. (The Sotero parties' appellees' brief omits their unconscionability arguments, and the majority opinion ignores them too. Therefore, this dissent does not address those arguments either.) Based on the bedrock separability doctrine, the majority opinion errs by considering a non-*Buckeye* contract making defense to the License and Lease Agreement as a whole, which issue the law reserves to the arbitrator.

2. The majority opinion's cases don't help the majority opinion.

a. *Ridge Natural Resources*

Ridge Natural Resources, L.L.C. v. Double Eagle Royalty, L.P. involved a contract calling for arbitration under both JAMS and AAA administration and rules. The trial court denied the defendant's motion to compel arbitration and the defendant appealed. The El Paso Court of Appeals reversed. 564 S.W.3d at 139–40.

The majority opinion's reliance on *Ridge* is misplaced because *Ridge* actually supports this dissent and contradicts the majority opinion's analytical framework. In short, *Ridge* holds that the defendant seeking to compel arbitration made a prima facie case that a valid arbitration agreement existed (despite the alleged ambiguity regarding the selected administrator and rules) because "the uncontested existence of the non-movant's signature on an arbitration agreement meets the evidentiary standard necessary to prove the prima facie existence of an arbitration agreement." *Id*. at 122. Thus, the burden shifted to the nonmovant to provide a reason why the arbitration agreement was defective. *Id*.

That court further explained that, notwithstanding the conflicting terms regarding the arbitration administrator and rules, the contracting parties' signatures on the lease were strong evidence that offeree accepted the offeror's terms and that the parties therefore concluded negotiations, met minds, and agreed to be bound. *Id*. Accordingly, the movant made its prima facie case, and the burden shifted to the nonmovant to provide a reason why the *arbitration agreement* was defective.

Because the nonmovant never urged the ground that the trial court should deny the motion to compel based on the ambiguity, the court of appeals could not affirm the order on that basis. *Id*.

In the present case, Baby Dolls is in an even better position than was Ridge. Here, like *Ridge*, there is no question about the legitimacy of Sotero's signature on the contract. And not only did the Sotero parties, like the *Ridge* nonmovants, never assert as a ground for denying the motions to compel that the arbitration agreement itself contained an irreconcilable ambiguity that would negate its effective offer and acceptance, but they affirmatively conceded the arbitration agreement's validity and argued (as relevant to this discussion) merely that the agreement's scope did not cover their disputes.

Furthermore, as explained in part II.B.3 below, the arbitration clause's meaning as an independent agreement is unambiguous and, to the extent warranted, there is a reasonable interpretation of the § 3 duration clause that the majority opinion finds confusing. Even if the parties' sometimes interchangeable use of "agreement" and "license" created some form of ambiguity, that ambiguity would not necessarily strike the arbitration clause's death knell. Rather, for an interpretational question to become a fatal meeting of the minds failure, it must constitute an irresolvable conflict affecting an essential term. *Id.* at 124–25. Otherwise, the majority opinion would render every contract that is ambiguous on a

material term null from its inception regardless of whether the ambiguity is resolvable, a result at odds with a millennium of common law contract law.

Because the majority opinion's perceived quandary is easily resolved by a common sense reading of the contract as a whole under the applicable rules of construction, there is no irreconcilable conflict at issue.

b. *Texas La Fiesta Auto Sales, LLC v. Belk*

The majority opinion's reliance on *Texas La Fiesta Auto Sales, LLC v. Belk*, 349 S.W.3d 872 (Tex. App.—Houston [14th Dist.] 2011, no pet.) is likewise misplaced. The issue in that case was whether a subsequent agreement revoked a prior arbitration agreement. Our sister court held that question was a contract existence issue for the courts to decide. *Id*. at 881. Given that revocation is a mirror image offer and acceptance issue, the result is unremarkable.

The majority opinion further errs by failing to recognize that the parties effectively delegated all other issues regarding the contract's validity, scope, and breadth to the arbitrator.

3. The majority opinion ignores the parties' delegation of arbitrability issues to the arbitrator.

Federal and Texas law permit parties to delegate most arbitrability issues to the arbitrator, if they do so in clear and unmistakable terms. *E.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527, 529–30 (2019); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942–43 (1995); *RSL Funding*, 569 S.W.3d

as 121. Courts must enforce such contractual delegations of authority—even if they believe the movant's arbitrability argument is "wholly groundless." *Henry Schein*, 139 S. Ct. at 529.

Texas law respects and enforces contracts that delegate these types of arbitration clause challenges to the arbitrator. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 648 (Tex. 2009) (orig. proceeding) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.") The obvious exceptions are questions involving the *Buckeye* contract making defenses of no signature, no authority, and no capacity that, if applicable, would preclude making the delegation agreement as well. *See RSL Funding*, 569 S.W.3d at 121, 124–25. But again, this case does not involve those issues. So the question is whether the parties clearly and unmistakably agreed to delegate validity and scope issues to the arbitrator. Having misapplied the separability doctrine, the majority opinion doesn't get to that issue.

Nonetheless, the arbitration clause provides the required delegation:

> ARBITRATION SHALL BE THE SOLE FORUM TO DETERMINE THE VALIDITY, SCOPE AND BREA[D]TH OF THIS AGREEMENT.

It is hard to imagine a more clear and unmistakable agreement to delegate to the arbitrator the authority to decide issues regarding their arbitration agreement's validity and scope. Because it includes both validity and scope issues, this sentence alone delegates both issues to the arbitrator. *See Dallas Food & Beverage, LLC v.*

Lantrip, No. 05-17-00647-CV, 2018 WL 1026188, at *2 (Tex. App.—Dallas Feb. 23, 2018, no pet.) (mem. op.) (delegation of validity alone not sufficient to also delegate scope).

Just because the parties disagree regarding that agreement's scope doesn't mean they failed to agree to *a* scope; it means only that they disagree as to what the scope they agreed to covers. Determining a contract's scope is a contract interpretation issue that is daily bread for courts and arbitrators alike. To conclude otherwise would invalidate the contract in virtually every contract breach case.

Thus, as they had the right to do, the parties contractually delegated to the arbitrator the authority to determine (i) the validity issue the majority opinion does decide and (ii) the scope issue the Sotero parties asked the court to decide.

Accordingly, the law requires us to reverse the trial court's orders and remand the case for the trial court to compel arbitration regarding any validity, scope, and merits issues without considering the contract interpretation issues regarding whether the parties' non-arbitration contract terms as a whole are unenforceable for failure to reach adequate agreement. Moreover, as shown below, the majority opinion's void for vagueness conclusion misapplies Texas contract construction principles.

4. The License and Lease Agreement doesn't lack agreement on the contract's essential terms.

a. Introduction

The term "meeting of the minds" refers to the parties' mutual understanding and assent to the expression of their agreement. *Weynand v. Weynand*, 990 S.W.2d 843, 846 (Tex. App.—Dallas 1999, pet. denied). To create an enforceable contract, the parties' minds must meet with respect to the agreement's subject matter and all its essential terms. *Id*. They must agree to the same thing, in the same sense, at the same time. *Id*. Whether there was a meeting of the minds is based on an objective standard of what the parties said and did rather than their subjective state of mind. *Crisp Analytical Lab, L.L.C. v. Jakalam Props., Ltd.*, 422 S.W.3d 85, 89 (Tex. App.—Dallas 2014, pet. denied).

Here, the parties' signed and detailed contract proves that they agreed to the same things, in the same sense, at the same time—their agreement is written down in great detail. And their contract's subject matter is undeniable—they wanted to memorialize the terms and conditions by which Sotero could use designated parts of Baby Dolls' venue for her own business purposes. It is also obvious that they were trying to avoid creating an employee–employer relationship. Their business arrangement had aspects similar to a combination of a license to use, a real estate lease of undivided space, and an independent contractor relationship. Thus, the

question is whether their written expression is sufficiently definite as to the essential terms of those arrangements to be enforced as a contract.

Resolving that question involves the application of contract construction principles, generally, and specific principles concerning this particular issue. The Texas Supreme Court in *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231 (Tex. 2016) provides substantial guidance on how to resolve the "meeting of the minds" issue.

b. General Principles

A court interpreting an arbitration agreement applies ordinary contract principles in determining the agreement's existence and reach. *Rubiola*, 334 S.W.3d at 224 ("Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate."); *Ascendant Anesthesia PLLC v. Abazi*, 348 S.W.3d 454, 458 (Tex. App.—Dallas 2011, no pet.) ("Whether an arbitration clause imposes a duty to arbitrate is a matter of contract interpretation . . . ."). Thus, we must apply ordinary Texas contract principles to resolve the void for vagueness issue.

In construing a written contract, we must ascertain and give effect to the parties' intentions as expressed in the document. *Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 311–12 (Tex. 2005) (per curiam); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). In seeking to determine the parties' intent, we construe contracts from a utilitarian standpoint, bearing in mind the

particular business activity sought to be served. *See Frost Nat'l Bank*, 165 S.W.3d at 311.

Additionally, we consider the entire writing and attempt to harmonize and give effect to all its provisions by analyzing them with reference to the whole agreement. *Id*. at 312; *Webster*, 128 S.W.3d at 229. "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Webster*, 128 S.W.3d at 229.

c. Sufficiency of Agreement Principles

Fischer explains in detail the standards courts consider when deciding whether contract terms are sufficient to constitute an enforceable contract. To begin, an enforceable contract must address all of its essential terms with a reasonable degree of certainty. 479 S.W.3d at 237. Although it is difficult to say just what particularity or refinement of terms is essential to meet the reasonable degree of certainty requirement, "a contract must at least be sufficiently definite to confirm that both parties actually intended to be contractually bound." *Id*. To that end, the terms must be sufficiently definite that a court can understand the parties' obligations and provide an adequate remedy if they are breached. *Id.*

However, a contract need be definite and certain only as to those terms that are material and essential to the parties' agreement. *Id*. Material and essential terms are those that the parties would reasonably regard as vitally important ingredients of their bargain, which is determined on a case by case basis. *Id*.

Several additional *Fischer* principles guide our analysis:

First, we may neither rewrite the parties' contract nor add to its language. Instead, we must construe the contract as a whole and "evaluate the overall agreement to determine what purposes the parties had in mind when they signed it." *Id*. at 239 (internal quotation omitted).

Second, because the law disfavors forfeitures, courts will find terms to be sufficiently definite whenever the language is reasonably susceptible to that interpretation. *Id*. If an instrument admits of two constructions, one that would make it valid and the other invalid, the former prevails. *Id*. Texas does not favor forfeitures and courts construe contracts to avoid them. *Id*. Thus, if the parties clearly intended to agree and a reasonably certain basis for granting a remedy exists, courts will find the contract terms definite enough to provide that remedy. *Id*. When the parties' conduct shows conclusively that they intended to conclude a binding agreement, courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain. *Id*.

Third, when construing an agreement to avoid forfeiture, courts may imply terms that can reasonably be implied. *Id*. "Expressions that at first appear incomplete or uncertain are often readily made clear and plain by the aid of common usage and reasonable implications of fact." *Id*. (quoting *Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966) (quoting RESTATEMENT OF THE LAW OF CONTRACTS § 370 & cmt. c)). For example, courts often imply terms setting a reasonable time

of payment—or a reasonable time during which the contract will remain effective. *Id*. (citing *Tanenbaum Textile Co. v. Sidran*, 423 S.W.2d 635, 637 (Tex. App.—Dallas 1967, writ ref'd n.r.e.) ("Where a contract is silent as to the time it is to run, or provides that it is to run for an indefinite term, . . . the law will imply that a reasonable time is meant.")).

Fourth, an apparently indefinite term may be given precision by usage of trade or the parties' course of dealings. *Id*. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term absent a contrary agreement. *Id*. at 239–40.

Fifth, and finally, courts are guided by the principle that part performance under an agreement may remove uncertainty and establish that a contract is enforceable because a bargain has been formed. *Id*. at 240. Furthermore, the parties' actions relying on an agreement may make a contractual remedy appropriate even though uncertainty is not removed. *Id*. When the parties' actions demonstrate their intent to conclude a binding agreement, although one or more terms are left open, courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain. *Id.* That is, the law favors finding agreements sufficiently definite for enforcement, particularly where one of the parties has performed her part of the contract. *Id*.

d. Application to the License and Lease Agreement

1. Analysis of the Contract's Terms

Assuming the court, instead of the arbitrator, has the authority to decide whether the contract as a whole fails for lack of a meeting of the minds on its essential terms, the majority opinion gets that issue wrong. It gets it wrong because (i) it doesn't identify what essential terms are missing; (ii) the parties sufficiently agreed on the essential terms; and (iii) the duration clause on which the majority opinion focuses is a run of the mill evergreen renewal clause capable of being given a reasonable construction.

Regarding the first two points, among other particulars, the contract defines its subject matter; agrees on the nature of the parties' working relationship (a non-employee right for Sotero to use parts of Baby Dolls' premises where she can perform her work); identifies services Baby Dolls will provide Sotero; specifies a work schedule; provides financial arrangements; and has numerous other terms and conditions. The parties specifically included a section addressing the contract's initial term and renewal rights. Given the parties' detailed effort to define and document the terms and conditions governing their relationship, it would be unreasonable to conclude that they did not intend to conclude a binding contract.

The majority opinion does not identify any particular unaddressed essential term. Instead, it focuses on imperfect language in the § 3 duration clause to conclude that the entire contract was a waste of time, paper, and toner—not to mention that it

ignores the nearly two years under which Sotero and Baby Dolls supposedly conducted their relationship without a meeting of the minds. All of that despite the parties' stated intent to form a binding contract and their statement that their agreement in fact represented their "meeting of the minds" regarding their relationship.

To reach its conclusion, the majority opinion adapts the Sotero parties' trial court argument that they were not bound by the arbitration agreement because it expired on December 31, 2017, when the agreement's lease portion expired but the license portion continued under the § 3 renewal terms.[4] But the contract delegates to the arbitrator this scope argument regarding whether the arbitration agreement applies to the Sotero parties' claims that arose in 2019. However, the majority opinion elevates that argument to what it conceives is a *Buckeye* contract making defense along the lines of the no signature, no authority, and no capacity defenses that a court must decide and that theoretically could erase the arbitration clause along with the rest of the contract. Nonsense.

---

[4] **3. DURATION OF LICENSE AND TEMPORARY SPACE LEASE: TERMINATION OF LICENSE AND TEMPORARY SPACE LEASE**

This **Agreement** shall be for the period commencing on the date it is signed by all parties (Agreement Commencement Date) and shall terminate on December 31 of the year of execution (unless the parties agree, in writing, to modify the term). The **License** shall thereafter be automatically extended for successive one year periods running from January[ ]1 through December 31 of each year thereafter. Notwithstanding the foregoing, at any time after the first year of the **License** term, this **License** may be terminated (a) within thirty (30) days after the receipt of written termination notice from the **Licensor** to **Licensee** (b) the last day of the month that is ninety (90) days after the receipt of a written termination notice from **Licensee** to **Licensor**, or (c) such sooner date in accordance with paragraph 19 hereof, any such dates which shall be the "License Termination Date." Upon the License Termination Date, **Licensee** shall have no further right to use and occupy the **Premises** and the **License** and lease rights granted to **Licensee** shall terminate.

First, that premise fails for the reasons stated in parts II.B.1 and 2 above.

Second, although that clause could be better written, it is easily understood to be a typical "evergreen" renewal clause whereby the contract automatically renewed annually each January first unless either party gave a proper, written termination notice. These types of automatic renewal clauses are common clubs in a contract drafters' golf bag. This is at least one reasonable way to construe § 3, and we must avoid the type of complete forfeiture the majority opinion produces if it is reasonably possible to do so. This automatic renewal construction is possible and reasonable. Therefore, we must adopt it. *See Fischer*, 479 S.W.3d at 239–40.

What is implausible is the idea that the parties intended to have no contract at all, which is the result the majority opinion produces.

It is also implausible that the parties meant that Sotero's license rights and responsibilities would continue after December 31, 2017, sans accompanying terms and conditions defining those rights and responsibilities. Yet that is the result their § 3 reading would produce. It is not possible to have a license with no accompanying terms.

So under what terms did Sotero and Baby Dolls operate from January 1, 2018, until her death? An obvious interpretation is that they understood their existing relationship to continue after that date on the same terms and conditions as before. Stated differently, their continued performance for more than a year after December

31, 2017, is strong evidence that they understood their relationship was automatically renewed under their existing contract.

Not only does this analysis negate the majority opinion's "license agreement but not license termination" argument, but it also rends the majority opinion's conclusion that the entire contract fails for lack of certainty regarding § 3's meaning.

Third, as the majority opinion observes, § 3 uses the words "Agreement" and "License" interchangeably. The majority opinion also correctly observes that the parties frequently used those words interchangeably throughout their contract. The obvious conclusion then is that the parties viewed the words to be interchangeable unless specific circumstances required a different usage. For example, it makes sense that an agreement would grant a license; whereas, it would make no sense for a license to grant a license or to grant an agreement. Likewise, it would make no sense for an agreement to grant an agreement. So those words necessarily have different meanings in the granting clause. But in other contexts using the words interchangeably doesn't necessarily matter, especially since the contract is a license agreement after all.

More specifically, the § 3 duration clause is one part of the contract where using the words interchangeably doesn't matter. It doesn't matter there because in that context it makes no sense to separate the continuing license from its accompanying terms and conditions on which it depends.

2. Compliance with the Guiding Principles

The majority opinion's analysis and conclusion do not comport with the guiding principles discussed in parts II.B.3.b and c above, but the analysis and conclusion discussed in this dissent do.

For example, this dissent's construction gives effect to the parties' intent to have a potentially ongoing, post-2017 business relationship based on terms spelled out in their contract, including its embedded arbitration agreement. Thus, that construction gives effect to the parties' intent when viewed from a utilitarian standpoint, bearing in mind the particular business activity sought to be served.

Likewise, this dissent harmonizes § 3's usage with the other contract provisions, without giving any single provision controlling effect, when construed in light of the entire contract and its purpose. The majority opinion doesn't do that.

Next, the dissent's analysis satisfies the specific *Fischer* factors because it provides a sufficiently definite meaning such that a court can understand the parties' obligations and provide an adequate remedy if necessary. It is easy to apply a run of the mill automatic renewal clause and determine whether the parties honored its notice and termination provisions. If they didn't, a trial court has a variety of potential legal and equitable remedies available to it. This is routine stuff for trial courts and commercial arbitrators. The majority opinion, however, does not entertain the prospect that § 3 is merely an unartfully written automatic renewal clause.

Additionally, the dissent gives full meaning to the parties' words without rewriting them, and it construes the contract as a whole and evaluates the overall agreement to implement the purposes the parties had in mind when they signed the contract—as opposed to the Sotero parties' after the fact wishes.

Furthermore, the dissent avoids a forfeiture, while the majority opinion foists a complete one on the parties.

Moreover, courts are able to resolve perceived uncertainties regarding a contract's duration by reference to common usages. Here, this opinion recognizes that automatic renewal clauses are often used in contracts; whereas, the majority opinion ignores that fact. Similarly, as shown by our recent decision in *Dallas Food & Beverage, LLC v. Lantrip*, No. 05-17-00647-CV, 2018 WL 1026188 (Tex. App.—Dallas Feb. 23, 2018, no pet.) (mem. op.), these lease agreement constructs are common in this community, which fact the dissent recognizes.

Finally, the parties' continued performance for more than a year after the 2017 initial contract term end date is powerful evidence they understood that Sotero's license and its accompanying terms continued during that post-2017 time period. Notably, there is no evidence suggesting that Sotero and Baby Dolls negotiated a different contract covering that span. Because there can be no license without at least some surrounding terms, the logical inference is that they continued their relationship under their existing contract. The majority opinion, however, gives no credence to that possibility.

C. Occam's Razor

As the majority opinion posits, it is often correct that the simplest answer is the best answer. However, a thorough and correct answer always trumps a simple and wrong answer.

III. CONCLUSION

In sum, the majority opinion ignores common sense and works to destroy the parties' expressed intent given the business and utilitarian goals they were striving to achieve.

For all of these reasons, we should (i) treat the Sotero/Baby Dolls embedded arbitration agreement as a standalone, independent contract; (ii) construe that independent contract according to normal contract construction rules; (iii) reverse the trial court's orders denying Baby Dolls' motions to compel arbitration; and (iv) remand the case for further proceedings consistent with this opinion. Because the majority opinion doesn't do that, I dissent.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

191443DF.P05

LICENSE AND LEASE AGREEMENT

NOTICE: THIS IS A LEGAL CONTRACT THAT AFFECTS THE LEGAL RIGHTS OF THE PARTIES TO THIS CONTRACT – READ IT!

AGREEMENT COMMENCEMENT DATE: 3/24/17

LICENSOR Baby Dolls Saloon-Dallas (the "Club" or "Licensor")

LICENSEE NAME: Stephenie Otero ("Licensee")

LICENSEE Stage Name: Mercedes

PREMISE(s):10250 Shady Trail, Dallas, Dallas County, Texas

LICENSEE ACKNOWLEDGES THAT LICENSEE HAS READ AND REVIEWED THIS AGREEMENT INCLUDING THE ATTACHED TERMS AND CONDITIONS IN ITS ENTIRETY, THAT LICENSEE HAS BEEN GIVEN AN OPPORTUNITY TO ASK LICENSOR QUESTIONS ABOUT IT OR EXPRESS ANY CONCERNS ABOUT THIS DOCUMENT, AND THAT LICENSEE HAS HAD AN OPPORTUNITY TO CONSULT WITH AN ATTORNEY OF LICENSEE'S CHOICE PRIOR TO ENTERING INTO THIS AGREEMENT. LICENSEE ACKNOWLEDGES THAT LICENSEE UNDERSTANDS THE TERM AND CONDITIONS OF THIS AGREEMENT AND KNOWINGLY AND FREELY AGREES TO ABIDE BY THEM.

THIS AGREEMENT REPLACES ANY PRIOR AGREEMENT BETWEEN THE PARTIES, AND SINCE THIS AGREEMENT IS THE MOST ACCURATE DESCRIPTION OF THE NATURE OF THE RELATIONSHIP OF THE PARTIES, AND REPRESENTS WHAT THE "MEETING OF THE MINDS" SHOULD HAVE BEEN WHEN THE PARTIES ESTABLISHED THEIR RELATIONSHIP, THE TERMS AND CONDITIONS HEREIN ARE DEEMED EFFECTIVE FROM THE DATE OF ANY PRIOR AGREEMENT BETWEEN THE PARTIES, SHOULD ONE EXIST.

This **AGREEMENT** is entered into by the **"LICENSOR"** and **"LICENSEE"** for the leasing of certain portions of the **"Premises"** and the grant of License related thereto as follows:

LICENSE/LEASE TERMS AND CONDITIONS

1. PURPOSE

The **Licensor** operates an adult cabaret on the **Premises**, and Licensee, who is engaged in the independently established trade and occupation of professional exotic dance entertainment and who runs Licensee's own business that provides such entertainment services, desires to lease from the **Club**, jointly together with other similar entertainers and upon the terms contained in this **Agreement**, the right to use certain areas of the **Premises** for activities related to the presentation of live dance entertainment to the adult public.

2. GRANT OF LICENSE/LEASE RIGHT

Licensee hereby licenses from the **Licensor** the right during normal business hours of **Licensor** to jointly, along with other entertainers, use the stage areas and certain other portions of the **Premises** designated by the **Licensor** for the performing of live erotic dance entertainment and related activities, upon the terms and conditions contained in this **Agreement**. The **Licensor** hereby grants **Licensee** a temporary, revocable license (the **"License"**) and non-exclusive right to use and occupy the designated portions of the **Premises** (the "Temporary Space Lease" or the "Lease") commencing on the Agreement Commencement Date and continuing until the Termination Date, defined herein, subject

Licensee's Initials

to the terms and conditions contained herein.

This **License** shall be limited to **Licensee's** use and occupancy of the **Premises** as an erotic entertainer/dancer and **Licensee** shall be entitled to perform such entertainment services at the **Club. Licensee** shall not use or occupy the **Club** or **Premises** or act or fail to act in any way which would constitute an event of default by **Licensee** under this **Agreement.**

3. DURATION OF LICENSE AND TEMPORARY SPACE LEASE: TERMINATION OF LICENSE AND TEMPORARY SPACE LEASE

This **Agreement** shall be for the period commencing on the date it is signed by all parties (Agreement Commencement Date) and shall terminate on December 31 of the year of execution (unless the parties agree, in writing, to modify the term). The **License** shall thereafter be automatically extended for successive one year periods running from January1 through December 31 of each year thereafter. Notwithstanding the foregoing, at any time after the first year of the **License** term, this **License** may be terminated (a) within thirty (30) days after the receipt of written termination notice from the **Licensor** to **Licensee** (b) the last day of the month that is ninety (90) days after the receipt of a written termination notice from **Licensee** to **Licensor,** or (c) such sooner date in accordance with paragraph 19 hereof, any such dates which shall be the "License Termination Date." Upon the License Termination Date, **Licensee** shall have no further right to use and occupy the **Premises** and the **License** and lease rights granted to **Licensee** shall terminate.

4. LICENSOR'S ADDITIONAL OBLIGATIONS

In addition to leasing the Premises, the **Club** shall provide to **Licensee,** at the **Club's** expense:

A. Music (including ASCAP/BMI/SESAC fees);

B. Dressing Room Facilities;

C. Lockers(as and if available);

D. Wait Staff;

E. Beverage Service; and

F. Advertisement of the **Club** (any advertisement specific to the **Licensee** shall be at **Licensee's** sole cost and expense and the **Club** shall have no obligation to advertise for the **Licensee**);

5. SUBLEASING/ASSIGNMENT

This **Agreement** is acknowledged to be personal in nature. This means that **Licensee** has no right to sublease or to assign any of Licensee's rights or obligations in this **Agreement** to any other person without the express written consent of the **Club.** However, if **Licensee** is unable to fulfill **Licensee's** contractual obligations during any scheduled set, **Licensee** shall have the right to substitute the services of any licensed entertainer who has also entered into a License and Lease Agreement with the **Club.** Licensee may substitute only one entertainer per scheduled set and for the complete length of the scheduled set (i.e. no partial set period substitution allowed). Any such substitution shall not, however, relieve **Licensee** of the rent, lost rent charge and/or contract damage obligations as contained in this **Agreement** if the substitute entertainer fails to pay any of those fees due as a result of the substitute's lease obligations. Licensor may assign **Licensor's** rights and obligations hereunder, but may not in doing so otherwise affect **Licencee's** License/Lease of the **Premises.**

6. NON-EXCLUSIVITY

Licensee's Initials

Licensee's obligations under this **Agreement** are nonexclusive, meaning that **Licensee** is free to perform **Licensee's** entertainment activities at other businesses or at locations other than at the **Club's Premises.**

7. **USE OF PREMISES**

Licensee agrees to:

A. Perform clothed, semi-nude (i. e. "topless") or nude (whichever is permitted by law) erotic, expressive dance entertainment at the **Premises** (but only in the manner and attire allowed under applicable law);

B. Obtain, keep in full force and effect, and have in **Licensee's** possession at all times while **Licensee** is on the **Premises** and available for inspection as may be required by law, any and all required licenses and/or permits and provide the **Club** with all necessary, current and accurate information about the **Licensee** required by law for the **Club** to maintain. The failure of **Licensee** to maintain current and in **Licensee's** possession a required license and/or permit shall not relieve **Licensee** of **Licensee's** rent obligations as provided for in this **Agreement**;

C. Not violate any federal, state, or local laws or governmental regulations. **Licensee** acknowledges, understands and agrees that any conduct by **Licensee** which is in violation of any such laws or regulations is beyond the scope of **Licensee's** authority pursuant to this **Agreement**, and constitutes a material breach of the terms of this **Agreement**;

D. Become knowledgeable of all laws and governmental regulations that apply to **Licensee's** conduct while on the **Premises** and comply therewith and in particular, of all regulations and laws related to businesses that provide alcoholic beverages, businesses that are defined as sexually oriented businesses and the Texas Penal Code. **Licensee** acknowledges, understands and agrees that any conduct by **Licensee** which is in violation of any such laws or regulations is beyond the scope of **Licensee's** authority pursuant to this **Agreement**, and constitutes a material breach of the terms of this **Agreement**;

E. Maintain accurate daily records of all income, including tips, earned while performing on the **Premises**, in accordance with all federal, state, and local taxation laws and this **Agreement**;

F. Pay for any damages **Licensee** causes to the **Premises** and/or to any of the **Club's** personal property, furniture, fixtures, inventory, stock and/or equipment, normal wear and tear excepted; and

G. Conduct his or herself in a manner consistent with normal civil decorum, decency and etiquette in dealings inside the Premises and with customers and other independent contractors and employees therein. **Licensee** acknowledges, understands and agrees that any conduct by **Licensee** which is in violation of any such conduct requirements is beyond the scope of **Licensee's** authority pursuant to this **Agreement**, and constitutes a material breach of the terms of this **Agreement**;

Licensee shall not use the name, logo, trademarks, service marks of **Licensor** without prior written authorization of the **Licensor.**

8. **NATURE OF PERFORMANCE**

The **Club** has no right to direct or control the nature, content, character, manner or means of **Licensee's** entertainment services or of **Licensee's** performances.

EXCEPT AS MAY IN WRITING BE SPECIFICALLY RELEASED, WAIVED OR TRANSFERRED, SO LONG AS

Licensee's Initials

THE RELATIONSHIP BETWEEN **LICENSEE** AND THE **CLUB** IS THAT OF LICENSOR/LESSOR AND LICENSEE/LESSEE. **LICENSEE** SHALL OWN AND RETAIN ALL INTELLECTUAL PROPERTY RIGHTS OF **LICENSEE'S** ENTERTAINMENT PERFORMANCES, INCLUDING BUT NOT LIMITED TO ALL COPYRIGHTS AND RIGHTS OF PUBLICITY. ALL OF THESE RIGHTS BECOME THE PROPERTY OF THE **CLUB**, HOWEVER, IF THE RELATIONSHIP IS EVER CHANGED TO THAT OF EMPLOYER AND EMPLOYEE.

9. COSTUMES

Licensee shall supply all of **Licensee's** own costumes and wearing apparel, which must comply with all applicable laws. The **Club** shall not control in any way the choice of costumes and/or wearing apparel made by **Licensee.**

10. NATURE OF BUSINESS

Licensee understands: 1) That the nature of the business operated at the **Premises** is that of adult entertainment; 2) that **Licensee** may be subjected to either full or partial nudity and explicit language; and 3) that **Licensee** may be subjected to advances by customers, to depictions or portrayals of a sexual nature, and to similar types of behavior. **Licensee** represents that **Licensee** is not, and will not be, offended by such conduct, depictions, portrayals, and language, and that **Licensee** assumes any and all risks associated with being subjected to these matters.

11. PRIVACY

Licensee and the Club acknowledge that privacy and personal safety are important concerns to **Licensee.** Accordingly, the **Club** shall not knowingly disclose to any persons who are not associated with the Club, or to any governmental entity, department, or agency, either the legal name of the **Licensee, Licensee's** address, or telephone number, EXCEPT upon prior written authorization of the **Licensee** or as may be required by law.

12. ENTERTAINMENT FEES

Based upon local industry custom and practice and in consultation with entertainers who lease space on the **Premises,** the **Club** shall establish a fixed fee for the price of certain performances engaged in on the **Premises** (referred to as **"Entertainment Fees").** Currently, the parties agree that the **Entertainment Fee** is that amount as set out in the **Specifications** attachment hereto. **Licensee** agrees not to charge a customer more or less than the fixed price for any such performance unless the **Licensee** notifies the **Club** in writing of any charges to **Licensee's** customers of a higher or lower amount. Nothing contained in this **Agreement,** however, shall limit **Licensee** from receiving "tips" and/or gratuities over-and-above the established price for such performances. THE PARTIES SPECIFICALLY ACKNOWLEDGE AND AGREE THAT **ENTERTAINMENT FEES** ARE NEITHER TIPS NOR GRATUITIES, BUT ARE, RATHER, MANDATORY CHARGES TO THE CUSTOMER AS THE PRICE FOR OBTAINING THE SERVICE OF A PERSONAL ENTERTAINMENT PERFORMANCE

13. BUSINESS RELATIONSHIP OF PARTIES

A. The parties acknowledge that the business relationship created between the **Club** and **Licensee** is that of (a) Licensor/Licensee and (b) landlord and tenant for the joint and non-exclusive leasing of the **Premises** (meaning that other entertainers are also leasing the premises at the same time), and that this relationship is a material (meaning significant) part of this **Agreement.** THE PARTIES SPECIFICALLY DISAVOW ANY EMPLOYMENT RELATIONSHIP BETWEEN THEM, and agree that this **Agreement** shall not be interpreted as creating an employer/employee relationship or any contract for employment. **LICENSEE** UNDERSTANDS THAT THE **CLUB** WILL NOT PAY **LICENSEE** ANY WAGE (WHETHER HOURLY OR OTHERWISE), OVERTIME PAY, EXPENSES, OR OTHER EMPLOYEE-RELATED BENEFITS

B. The **Club** and **Licensee** acknowledge that if the relationship between them was that of employer and employee,

Licensee's Initials

the **Club** would be required to collect, and would retain, all **Entertainment Fees** paid by customers to **Licensee**. **LICENSEE** SPECIFICALLY ACKNOWLEDGES AND AGREES THAT IN THE CIRCUMSTANCE OF AN EMPLOYER/EMPLOYEE RELATIONSHIP ALL **ENTERTAINMENT FEES** WOULD BE, BOTH CONTRACTUALLY AND AS A MATTER OF LAW, THE PROPERTY OF THE CLUB AND WOULD NOT BE THE PROPERTY OF **LICENSEE**. THE PARTIES ACKNOWLEDGE THAT **LICENSEE'S** RIGHT TO OBTAIN AND KEEP **ENTERTAINMENT FEES** PURSUANT TO THIS **AGREEMENT** IS SPECIFICALLY CONTINGENT AND CONDITIONED UPON THE BUSINESS RELATIONSHIP OF THE PARTIES BEING THAT OF LICENSOR/LESSOR AND LICENSEE/LESSEE.

C. The parties additionally acknowledge that were the relationship between them to be that of employer and employee, **Licensee's** employment would be "at will" (meaning **Licensee** could be fired at any time without cause and without prior notice or warning), and that the **Club** would be entitled to control, among other things, **Licensee's**: Work schedule and the hours of work; job responsibilities; physical presentation (such as make-up, hairstyle, etc.); costumes and other wearing apparel; work habits; the selection of **Licensee's** customers; the nature, content, character, manner and means of **Licensee's** performances; and **Licensee's** ability to perform at other locations and for other businesses. **Licensee** hereby represents that **Licensee** desires to be able to make all of these choices for **Licensee** and without the control of the **Club**, and the **Club** and **Licensee** agree by the terms of this **Agreement** that all such decisions are exclusively reserved to the control of **Licensee**. **LICENSEE** FURTHER SPECIFICALLY REPRESENTS THAT **LICENSEE** DOES NOT DESIRE TO PERFORM AS AN EMPLOYEE OF THE **CLUB** SUBJECT TO THE EMPLOYMENT TERMS AND CONDITIONS OUTLINED IN THIS PARAGRAPH 13, BUT, RATHER **LICENSEE** DESIRES TO PERFORM AS A LICENSEE/TENANT CONSISTENT WITH THE OTHER PROVISIONS OF THIS **AGREEMENT**.

D. If any court, tribunal, or governmental agency determines, or if **Licensee** at any time contends, claims, or asserts, that the relationship between the parties is something other than that of Licensor/Lessor and Licensee/Lessee and that **Licensee** is then entitled to the payment of monies from the **Club**, all of the following shall apply:

(i) In order to comply with applicable tax laws and to assure that the **Club** is not unjustly harmed and that **Licensee** is not unjustly enriched by the parties having financially operated pursuant to the terms of this **Agreement**, the **Club** and **Licensee** agree that **Licensee** shall surrender, reimburse and pay to the **Club**, all **Entertainment Fees** received by **Licensee** at any time **Licensee** performed on the **Premises** - all of which would otherwise have been collected and kept by the **Club** had they not been retained by **Licensee** under the terms of this **Agreement**- and shall immediately provide a full accounting to the **Club** of all tip income which **Licensee** received during that time;

(ii) Any **Entertainment Fees** that **Licensee** refuses to return to the **Club** shall be deemed service charges to the customer and shall be accounted for by the **Club** as such. **Licensee** shall owe the **Club** the amount of such **Entertainment Fees** and as such, the **Club** shall then be entitled to full wage credit for all **Entertainment Fees** retained by **Licensee**, and such withheld fees shall therefore constitute wages paid from the **Club** to **Licensee**. In the event that **Licensee** refuses to return **Entertainment Fees** to the **Club**, the **Club** shall immediately submit to the IRS and applicable state taxing authorities all necessary filings regarding such income consistent with this subparagraph;

(iii) If despite **Licencee's** express obligation hereunder to maintain accurate records, the **Licensee** is unable or unwilling to provide the **Club** with reliable documentation of all **Entertainment Fees** received by **Licensee** at any time **Licencee** performed on the premises, **Licensee** and the **Club** hereby stipulate and agree that the amount of **Entertainment Fees** received by

Licensee shall be deemed to be an amount in excess of any minimum hourly wage to which **Licensee** would be entitled as an employee.

(iv) The relationship of the parties shall immediately convert to an arrangement of employer and employee upon the terms as set forth in this paragraph.

(v) If at any time **Licensee** believes that, irrespective of the terms of this **Agreement, Licensee** is being treated as an employee by the **Club** or that **Licencee's** relationship with the **Club** is truly that of an employee, **Licensee** shall immediately, but in no event later than three business days thereafter, provide notice to the **Club** in writing of **Licensee's** demand to be fully treated as an employee consistent with the terms of this paragraph and applicable law, and shall also within the same time period begin reporting all of **Licensee's** tip income to the **Club** on a daily basis; such tip reporting being required of all tipped employees of the **Club** under the terms of the Internal Revenue Code.

14. TAXES

Licensee shall be solely responsible for, and shall pay, all federal, state, and local taxes and contributions imposed upon any income earned by **Licensee** while performing on the **Premises** (including but not limited to income taxes and social security obligations). **Licensee** shall indemnify and hold harmless the **Club** from any such taxes. **Licensee** shall keep all required records and supporting proof thereof.

15. SCHEDULING OF LEASE DATES

Licensee shall select, at least one week in advance, any and all days that **Licensee** desires to lease the **Premises** during the following week, and the **Club** shall make the leased portion of the **Premises** available to **Licensee** during those dates and times, subject only to space availability. Should **Licensee** desire not to perform on the **Premises** at all during any given week, **Licensee** shall give the **Club** notice of this at least one week in advance. Once scheduled, neither **Licensee** nor the **Club** shall have the right to cancel or change any scheduled performance dates except as may be agreed to by **Licensee** and the **Club.** For each day that **Licensee** schedules him or herself to perform, **Licensee** agrees to be on the **Premises,** available to perform, for a minimum number of consecutive hours as stated in the **"SPECIFICATIONS"** section on the last page of this **Agreement** (one "set"). During those weeks that **Licensee** desires to perform, **Licensee** agrees to lease space at the **Premises** for at least the minimum number of sets per week as stated in the **"SPECIFICATIONS"** section of this **Agreement. Licensee** may be permitted to lease space on the **Premises** on days when **Licensee** has not scheduled him or herself to perform, subject to space availability.

If **Licensee** misses an entire scheduled set, **Licensee** shall pay to the **Club** as a lost rent charge, a fee for each set missed as stated in the **"SPECIFICATIONS"** section of this **Agreement,** which is to be paid by **Licensee** to the **Club** no later than by the end of **Licensee's** next set. If **Licensee** fails to timely commence a scheduled set, **Licensee** shall pay to the **Club** as contract damages $8.00 for each one-half hour missed up to a maximum of the lost rent charge as stated in the **"SPECIFICATIONS"** section of this Agreement, which is to be paid by **Licensee** to the **Club** no later than by the end of that set. All lost rent charges and contract damages stated in this **Agreement** are established in view of the fact that it would be difficult to determine the exact lost rent or damage incurred as a result of certain breaches of the terms of this **Agreement.**

16. RENT

Licensee agrees to pay rent to the **Club** (referred to as **"set rent"**) in the amounts as stated in the **"SPECIFICATIONS"** section of this Agreement. All **set rent** shall be paid immediately on or before completion of any set.

17. MATERIAL BREACH BY CLUB

Licensee's Initials

The **Club** materially breaches this **Agreement** by:

A. Failing to provide to **Licensee** the leased portion of the **Premises** on any day as scheduled by **Licensee;**

B. Failing to maintain any and all required and available licenses and/or permits;

C. Failing to maintain in full force any and all leases and subleases with the owner of the **Premises;**

D. Failing to maintain in full force all utilities services for the **Premises;** and

E. Failing to maintain the **Premises** in a safe and orderly manner.

The **Club** shall not be liable for any material breach as set forth in this paragraph due to acts of God, to any other cause beyond the reasonable control of the **Club,** or as a result of the action of any government entity or agency or the interpretation thereby of any law rule or regulation affecting the **Club.**

18. MATERIAL BREACH BY LICENSEE

Licensee materially breaches this **Agreement** by:

Failing to maintain any and all required licenses and/or permits;

Willfully violating any federal, state, or local law or regulation while on the **Premises;**

Failing to appear for a scheduled set on two or more occasions in any one calendar month without proving a proper substitute as allowed and in the manner provided for herein;

Failing to pay any set **rent** when due;

Failing to timely pay any assessed lost rent charges or contract damages;

Claiming the business relationship with the **Club** as being other than that of a landlord and tenant;

Violating any public health or safety rules or concerns; or

Violating any of the provisions of this **Agreement.**

19. TERMINATION/BREACH /DEFAULT

In the event **Licensee** shall be in default of any obligation to pay money under this **Agreement** or in the event **Licensee** shall be in default of any non-monetary provision of this **Agreement** (including but not limited to violation any Federal, state or local laws or regulations), the **License** granted to **Licensee** herein shall immediately terminate, and **Licensor** shall have the right to the extent permitted by law, to (i) immediately withdraw the permission hereby granted to **Licensee** to use the **Premises;** and (ii) remove all persons and property therefrom, without being deemed to have committed any manner of trespass, assault or false imprisonment. Such remedies shall be in addition to any other rights or remedies **Licensor** may have hereunder or at law or equity.

In the event **Licensor** shall be in default of **Licensor's** obligations hereunder, **Licensee's** sole remedy is to terminate this **Agreement.**

Either party may terminate this **Agreement,** without cause, upon thirty (30) days notice to the other party. Upon material

breach, the non-breaching party may terminate this **Agreement** upon twenty-four (24) hours notice to the other party, or as otherwise may be provided by law. Nothing in this paragraph, however, shall allow **Licensee** to perform on the **Premises** without a valid license or permit, if applicable, or to continue to engage in conduct in violation of any laws, regulations, or public health or safety rules or concerns.

20. SEVERABILITY

If any provision of this **Agreement** or the application thereof to any person or circumstance shall, for any reason and to the extent, be invalid or unenforceable, the remainder of this **Agreement** and the application of such provision to the other person or circumstance shall not be affected thereby, but rather shall be enforced to the greatest extent permitted by law. In the event that any term, paragraph, subparagraph, or portion of this **Agreement** is declared to be illegal or unenforceable, this **Agreement** shall, to the extent possible, be interpreted as if that provision was not a part of this **Agreement;** it being the intent of the parties that any illegal or unenforceable portion of this **Agreement,** to the extent possible, be severable from this **Agreement** as a whole. Nevertheless, in the circumstance of a judicial, arbitration, or administrative determination that the business relationship between **Licensee** and the **Club** is something other than that of landlord and tenant, the relationship between **Licensee** and the **Club** shall be controlled by the provisions of this **Agreement.**

21. GOVERNING LAW

This **Agreement** shall be interpreted pursuant to the laws of the State of Texas

22. ARBITRATION/WAIVER OF CLASS AND COLLECTIVE ACTIONS/ATTORNEY FEES AND COSTS

The parties agree that this **Agreement** is subject to binding arbitration pursuant to the Federal Arbitration Act (the "FAA"), and any disputes under this Agreement. as well as any disputes that may have arisen at any time during the relationship between the parties, including but not limited to under any Federal or State law, will be governed and settled by an impartial independent arbitrator appointed by the American Arbitration Association (the "AAA"), Texas branch, and the determination of the arbitrator shall be final and binding (except to the extent there exist grounds for vacation of an award under applicable arbitration statutes). The parties agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to any proceedings commenced under this Section 22. The arbitrator will have no authority to make any ruling, finding or award that does not conform to the terms and conditions of this Agreement. Each party shall bear its own attorneys fees, expenses and costs in any arbitration except for the fees of the arbitrator as specifically provided for in this Section 22. The arbitrator will have no authority to make an award of attorneys fees, expenses and costs in any arbitration except to make an award for the fees charged by the arbitrator. The arbitration provision contained herein shall be self-executing and shall remain in full force after expiration or termination of this **Agreement.** In the event any party fails to appear at any properly noticed arbitration proceeding, an award may be entered against such party by default or otherwise, notwithstanding such failure to appear. The place of arbitration shall be IN THE COUNTY IN TEXAS IN WHICH THE PREMISES IS LOCATED. The arbitrator shall give effect insofar as possible to the desire of the parties hereto that the dispute or controversy be resolved in accordance with good commercial practice and the provisions of this Agreement. To the fullest extent permitted by law, the arbitrator shall apply the commercial arbitration rules of the American Arbitration Association and Title 9 of the U.S. Code, except to the extent that such rules conflict with the provisions of this Section 22 in which event the provisions of this Section 22 shall control.

THE PARTIES WAIVE ANY RIGHT TO LITIGATE SUCH CONTROVERSIES, DISPUTES, OR CLAIMS IN A COURT OF LAW, AND WAIVE THE RIGHT TO TRIAL BY JURY. THE PARTIES WAIVE ANY RIGHT TO HAVE ANY CLAIM BETWEEN THEM ARBITRATED ON A CLASS OR COLLECTIVE ACTION BASIS AND THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS BETWEEN THE PARTIES TO BE ARBITRATED ON A CLASS ACTION BASIS NOR ON A COLLECTIVE ACTION BASIS. ALL PARTIES SHALL HAVE THE RIGHT TO BE REPRESENTED BY LEGAL COUNSEL AT

Licensee's Initials

ARBITRATION. THE ARBITRATOR SHALL PERMIT REASONABLE DISCOVERY. THE PARTIES SHALL HAVE THE RIGHT TO SUBPOENA WITNESSES IN ORDER TO COMPEL THEIR ATTENDANCE AT HEARING AND TO CROSS-EXAMINE WITNESSES, AND THE ARBITRATOR'S DECISION SHALL BE IN WRITING AND SHALL CONTAIN FINDINGS OF FACT AND CONCLUSIONS OF LAW. THE ARBITRATOR'S DECISION SHALL BE FINAL, SUBJECT ONLY TO REVIEW PURSUANT TO THE FAA.

FOR ANY CLAIMS OF THE LICENSEE BASED UPON ANY FEDERAL, STATE OR LOCAL STATUTORY PROTECTIONS, THE CLUB SHALL PAY ALL FEES CHARGED BY THE ARBITRATOR. THE ARBITRATOR SHALL HAVE EXCLUSIVE AUTHORITY TO RESOLVE ANY AND ALL DISPUTES OVER THE VALIDITY OF ANY PART OF THIS LICENSE, AND ANY AWARD BY THE ARBITRATOR MAY BE ENTERED AS A JUDGMENT IN ANY COURT HAVING JURISDICTION.

LICENSEE UNDERSTANDS AND ACKNOWLEDGES THAT BY SIGNING THIS AGREEMENT HE/SHE SPECIFICALLY WAIVES ANY RIGHT TO PARTICIPATE IN ANY CLASS ACTION OR COLLECTIVE ACTION AND IF AT ANY TIME LICENSEE IS DEEMED A MEMBER OF ANY CLASS OR COLLECTIVE GROUP CREATED BY ANY COURT IN ANY PROCEEDING, HE/SHE WILL "OPT OUT" OF SUCH CLASS OR COLLECTIVE GROUP AT THE FIRST OPPORTUNITY, AND SHOULD ANY THIRD PARTY PURSUE ANY CLAIMS ON HIS/HER BEHALF LICENSEE SHALL WAIVE HIS/HER RIGHTS TO ANY SUCH MONETARY RECOVERY.

This Agreement to arbitrate shall apply to claims or disputes that are asserted by either party hereto against third parties **when the basis of such dispute or the claims raised by a party hereto are, or arise from, disputes that are required to be arbitrated under this Agreement.** Such applies to claims made against officers, directors, shareholders, and/or employees of any corporate party, any alleged joint actors, or based on any legal theory, claim or right that a third party is liable for the actions or obligations of a party to this Agreement.

The parties agree that if any party refuses to proceed to arbitration of a claim subject to arbitration herein upon request or demand that they do so, that party refusing to go to arbitration shall be liable to the requesting/demanding party for all fees and cost incurred in compelling arbitration.

ARBITRATION SHALL BE THE SOLE FORUM TO DETERMINE THE VALIDITY, SCOPE AND BREATH OF THIS AGREEMENT.

23. MISCELLANEOUS

This Agreement constitutes the entire understanding of the parties. No representations or warranties have been made by either party to the other, or by anyone else, except as expressly set forth in this Agreement and the Specification attachment hereto, provided however, if this Agreement is not the initial Agreement on this subject matter executed by the parties, the parties have also executed contemporaneously with the execution of this Agreement, a "Mutual Release of Claims" which is part and parcel of the Parties' agreement and made a part hereof, the same as if fully copied and set out at length herein.

No prior oral or written statements, representations, promises and inducements have been made by either of the parties relating to the subject matter hereof which are not embodied in this Agreement.

The Club's failure to insist on compliance or enforcement of any provision of this Agreement shall not affect the validity or enforceability of this Agreement or operate or be construed as a waiver of any future enforcement of that provision or any other provision of this Agreement.

This Agreement may not be modified or amended except in accordance with a writing signed by each of the parties hereto.

Licensee's Initials

Sections/Paragraphs 1,6,11,12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, and 25 shall survive the termination of this **Agreement.**

The headings used in this **Agreement** are used for administrative purposes only and do not constitute substantive matters to be considered in construing the terms of this **Agreement.**

Time is of the essence in the performance of this **Agreement.**

This **Agreement** may be executed in multiple original counterparts, in such event each of which shall be deemed an original, but which together shall constitute one and the same instrument.

Words of any gender used in this **Agreement** shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural and vice versa, unless the context requires otherwise.

If any time period or deadline hereunder expires on a Saturday, Sunday or legal holiday recognized in the State of Texas, the time period or deadlines shall be extended to the first business day thereafter.

The effective date of this **Agreement** shall be upon the date it is signed by all parties.

Nothing herein shall be construed or constitute a partnership or joint venture between the parties hereto.

This **Agreement** shall be binding upon and shall inure to the benefit of Licensor and Licensee and their respective legal representatives, successors and assigns.

If any one or more of the provisions contained in this **Agreement** shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this **Agreement** shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

All parties will do all things reasonably necessary or appropriate to fulfill the terms and conditions of this **Agreement**, including the execution of all necessary documents pertaining thereto.

BECAUSE OF LEGAL RESTRICTIONS, THE **CLUB** WILL NOT ENTER INTO A **AGREEMENT** WITH AN **LICENSEE** WHO IS UNDER THE AGE OF EIGHTEEN (18) AND THIS **AGREEMENT** IS NULL AND VOID IF **LICENSEE** IS NOT OF SUCH AGE. **LICENSEE** SPECIFICALLY REPRESENTS THAT **LICENSEE** IS OF THIS LAWFUL AGE OR OLDER, THAT **LICENSEE** HAS PROVIDED APPROPRIATE IDENTIFICATION VERIFYING **LICENSEE'S** AGE, AND THAT SUCH IDENTIFICATION IS VALID AND AUTHENTIC.

BY SIGNING THIS DOCUMENT, **LICENSEE** REPRESENTS THAT **LICENSEE** HAS RECEIVED A COPY OF, AND HAS FULLY READ THIS **AGREEMENT**; THAT **LICENSEE** UNDERSTANDS, AND AGREES TO BE BOUND BY, ALL OF ITS TERMS; AND THAT **LICENSEE** HAS BEEN PERMITTED TO ASK QUESTIONS REGARDING ITS CONTENTS AND HAS BEEN GIVEN THE OPPORTUNITY TO HAVE IT REVIEWED BY PERSONS OF **LICENSEE'S** CHOICE, INCLUDING ATTORNEYS AND ACCOUNTANTS.

24. RELEASE FROM LIABILITY

Licensee agrees that **Licensor** shall not be responsible or liable for any damage or injury to any property or to any person or persons at any time on or about the **Premises** arising from any cause whatsoever except **Licensor's** willful misconduct. **Licensee** shall not hold **Licensor** in any way responsible or liable therefore and will indemnify and hold **Licensor** harmless - from and against any and all claims, liabilities, penalties, damages, judgements and expenses (including, without limitation, reasonable attorneys fees and disbursements) arising from injury to person or property of any nature

Licensee's Initials

arising out of **Licensee's** use or occupancy of the **Premises** and also for any other matter arising out of **Licensee's** use or occupancy of the **Premises** including damage or injury caused by **Licensee.**

25. CONFIDENTIALITY

Licensor and **Licensee** acknowledge that each may come into contact with information in all forms regarding the other's business, clients and clients' businesses. All such information shall be deemed confidential information and shall not be used or communicated by the other at any time for any reason whatsoever.

26. NOTICES

Any notices required or permitted to be given to either party under this **Agreement** shall be given to the representative parties at the address written provided in this **Agreement** by hand, by reputable overnight courier (for next business day delivery) or by Certified mail, return receipt requested. Such notices shall be deemed given upon: a) delivery, in the case of hand delivery; b) one business day after mailing in the case of overnight courier, and c) three business days after mailing, in the case of mailing.

NOTICE: THIS IS A LEGAL CONTRACT. DO NOT SIGN IT UNLESS YOU FULLY UNDERSTAND ALL OF ITS TERMS. IF YOU HAVE ANY QUESTIONS, FEEL FREE TO TALK TO THE CLUB'S GENERAL MANAGER. ANY NEGOTIATED CHANGES TO THIS CONTRACT MUST BE INITIALED BY BOTH PARTIES IN THE MARGINS DIRECTLY NEXT TO THE MODIFICATIONS. WE SUGGEST THAT BEFORE SIGNING THIS CONTRACT, YOU HAVE IT REVIEWED BY AN ATTORNEY, ACCOUNTANT, OR OTHER PERSON OF YOUR CHOICE.

AGREED TO AND ACKNOWLEDGED BY:

Stephanie Stern
Licensee (Legal name of Licensee)
Date:
Address(City State Zip) [illegible] Creek Cir, Arlington TX 76015
Phone 469-537-3815
email address
Permit Number 469-537-3815

Witness & Authorized Representative of the Licensor, Baby Dolls Saloon - Dallas
Date: 2.24.17

Licensee's Initials

SPECIFICATIONS

The agreed minimum number of "Sets" per week is 3.

Each Scheduled performance day "Set" shall consist of either (a) an eight (8) consecutive hour period for day shift (11:00 a.m. to 7:00 p.m.), (b) a seven (7) consecutive hour period for night shift (7:00 p.m. to 2:00 a.m.), or (c) an eight (8) consecutive hour period for "cross" shift (any eight (8) consecutive hour period from 11:00 a.m. to 2:00 a.m.).

The agreed Rental charges OR "SET FEES" for day shift (11:00 a.m. to 7:00 p.m.) is $10.00 per shift/set.
The agreed Rental charges OR "SET FEES" for night shift (7:00 p.m. to 2:00 a.m.), is $25.00 per shift,
The agreed Rental charges OR "SET FEES" for cross shift (any eight (8) consecutive hour period from 11:00 a.m. to 2:00 a.m.) is $25.00 per shift.

The agreed "loss rental fee" is an amount equal to the above rental charge/Set Fee applicable for the set missed.

The agreed current industry customary Entertainment Fee for a private performance/table dance is $20.00 per dance.

Licensee Name: Stephanie Peters — Date: 3/24/17

Witness & Authorized Representative of the Licensor — Date: 3/24/17